

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PHILLIP BRIAN ZABAWA,

Defendant-Appellant.

UNPUBLISHED

May 24, 2005

No. 252585

Monroe Circuit Court

LC No. 02-032306-FH

Before: Murphy, P.J., and White and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for third-degree fleeing and eluding, MCL 750.479a, malicious destruction of police property, MCL 750.377b, and carrying or possessing a firearm during the commission or attempted commission of a felony, MCL 750.227b. Defendant was sentenced as a fourth habitual offender, MCL 769.12, to fifty-eight months to twenty-five years in prison for the third degree fleeing and eluding conviction, fifty-eight months to fifteen years in prison for the malicious destruction of police property conviction, and two years in prison for the felony-firearm conviction. We affirm. This case is being decided without oral argument pursuant to MCR. 7.214(E).

Defendant first argues that the trial court deprived him of the opportunity to present a defense in violation of his due process rights when it refused to order a bullet, which defendant claimed was exculpatory evidence, removed from his face. We disagree.

Throughout pretrial, defendant repeatedly raised the issue of medical treatment with the trial court and the trial court repeatedly informed defendant that it was not qualified to determine what medical care defendant needed. However, the trial court made it clear that defendant was to receive whatever medical care was deemed necessary and issued an order on October 22, 2002, to that effect. Until December 5, 2002, defendant never requested that the trial court order the removal of a bullet or bullets from his face for evidentiary purposes.¹ At the December 5,

¹ In his brief, defendant erroneously states that he made such a request during the November 15, 2002 hearing. At this hearing, defendant requested the appointment of experts on pharmacology, accident reconstruction, and video analysis. Defendant also asked for access to a law library, access to an eye doctor and complained of medical problems he believed were caused by the

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2002 hearing, defendant personally asked the trial court to order the removal of the bullet for evidentiary purposes. Immediately after defendant made the request, his trial counsel explained that defendant was supposed to be going to the University of Michigan hospital to have the bullet removed and asked the trial court to sign an order requiring the preservation of whatever might be removed. The trial court responded by stating that it had no problem signing an order requiring the preservation of any removed bullets. At an April 9, 2003 hearing, the trial court learned that the surgery to remove the bullet had never occurred because it was considered elective. Defendant then asked the trial court to order the procedure for medical reasons. The trial court reiterated that it would not order a procedure that was not medically necessary and denied the motion.

Because defendant's sole request for the surgical removal of the bullet based on evidentiary grounds was raised and abandoned at the December 5, 2002, the trial court never actually had the opportunity to rule on a motion requesting an order to have the bullet removed on this ground. Once defendant learned that the surgery would not take place as expected, defendant was obligated to renew his motion to compel the surgery based on evidentiary grounds rather than medical grounds. Defendant did not do so and cannot now complain that the trial court deprived him of due process of law by failing to order something he did not request. There was no error.²

Defendant next argues that the trial court improperly scored him five points for offense variable (OV) 1. We disagree.

This Court reviews a sentencing court's factual findings for clear error. MCR 2.613(C); *People v Houston*, 261 Mich App 463, 471; 683 NW2d 192 (2004), lv gtd not in relevant part 471 Mich 913 (2004). However, the proper application of the statutory sentencing guidelines presents a question of law, calling for review de novo. *Id.*

A sentencing court has discretion in determining the number of sentencing guideline points to be scored provided that evidence of record adequately supports a particular score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). A scoring decision for which there is any evidence in support will be upheld. *Id.* This Court reviews the scoring to determine whether the sentencing court properly exercised its discretion and whether the evidence adequately supported a particular score. *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003).

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bullet, which he wanted removed. Defendant did not state that he wanted the bullet fragment removed for evidentiary reasons.

² Defendant claimed that the bullet would help establish that he was shot before striking the officer's patrol car and that this injury caused the collision rather than any deliberate act on his part. Defendant adequately and fairly presented this theory at trial without the bullet, which would likely have had little evidentiary value. Based on these facts, even if we were to determine that defendant had made such a motion and that the trial court improperly refused to grant it, we would find the error to be harmless beyond a reasonable doubt. See *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

In calculating the sentencing guidelines, a court must assess the highest applicable points under OV 1, depending on conduct related to the use of a weapon. Five points must be assessed if a weapon was displayed or implied. MCL 777.31; *People v Morson*, 471 Mich 248, 256-257; 685 NW2d 203 (2004). The trial court assessed defendant five points for OV 1.

Trial testimony established that defendant was seen moving through the motor home with what appeared to be a weapon. In addition, when the police entered the defendant's vehicle they found defendant lying on his belly with a handgun under him in his left hand. Two rifles were also recovered from the motor home. Therefore, sufficient evidence was presented to support a scoring of 5 points under OV 1 for displaying or implying a weapon. As long as there is any evidence in support of a scoring decision it will be upheld. *Hornsby, supra* at 468.

Affirmed.

/s/ William B. Murphy
/s/ Helene N. White
/s/ Michael R. Smolenski